

1 ROBERT A. DOLINKO, State Bar No. 076256  
rdolinko@nixonpeabody.com  
2 KENT JONAS, State Bar No. 55001  
kjonas@nixonpeabody.com  
3 DEBORAH R. SCHWARTZ, State Bar No. 208934  
dschwartz@nixonpeabody.com  
4 NIXON PEABODY LLP  
5 One Embarcadero Center, 18th Floor  
San Francisco, California 94111-3600  
6 Telephone: (415) 984-8200  
Fax: (415) 984-8300

7 Attorneys for  
8 NIXON PEABODY LLP

9  
10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 OAKLAND DIVISION  
13

14 JESSE HELTON; ALISHA PICCIRILLO; CHAD  
15 LOWE; individually and on behalf of all others  
similarly situated,

16 Plaintiffs,

17 vs.

18 FACTOR 5, INC.; FACTOR 5, LLC;  
19 BLUHARVEST, LLC; WHITEHARVEST LLC;  
JULIAN EGGBRECHT; HOLGER SCHMIDT;  
20 THOMAS ENGEL; and DOES 1-100,  
21 Defendants.

Case No.: 4:10-CV-04927-SBA

**[PROPOSED] ORDER REGARDING  
PRODUCTION OF DOCUMENTS BY  
NIXON PEABODY LLP**

22 Plaintiffs have subpoenaed documents from Nixon Peabody LLP (“Nixon”), former counsel  
23 for Defendants Factor 5, Inc., and WhiteHarvest, Inc, in this case. Nixon objected to this subpoena.  
24 Plaintiffs and Nixon met and conferred regarding those objections and Plaintiffs brought the dispute  
25 before the Court at a hearing on November 15, 2013. Following that hearing, the Court issued an  
26 order holding that Factor 5, Inc., and WhiteHarvest, Inc., had each waived attorney – client privilege  
27 but that Nixon had not waived work product protection.  
28

1 At the Court's direction, Plaintiffs and Nixon met and conferred further regarding their  
2 dispute. As a result, Plaintiffs narrowed their requests. Nixon then produced a number of  
3 documents, but objected to producing those in two categories:

- 4 1. Nixon searched the electronically stored information ("ESI") of Patrick Sweeney, Lou  
5 Cisz and Victor Milione created on or before January 31, 2009, which included the terms  
6 F5, Factor 5, Factor5, WhiteHarvest, BluHarvest, WH or BH. This search produced 1,277  
7 documents consisting of 34,105 pages that were potentially responsive..  
8
- 9 2. Nixon searched the ESI of Patrick Sweeney in which the names of Julian Eggebrecht,  
10 Katja Reitemyer, Holger Schmidt, Thomas Engel, and/or Achim Moller appeared in the  
11 "to", "from", or "cc" lines. This search produced 272 documents consisting of 898 pages  
12 of responsive communications on or before January 31, 2009, which Nixon produced  
13 while withholding those which it asserts are work product, ,and 1042 documents  
14 consisting of 3470 pages of communications after January 31, 2009, which Nixon  
15 continued to object to producing.  
16

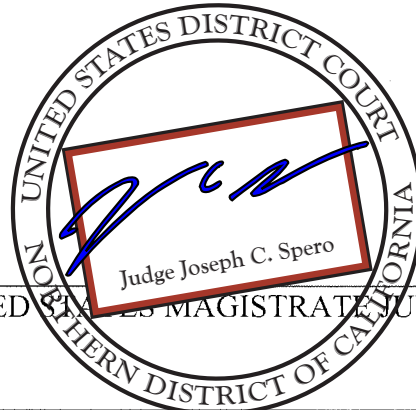
17 The Court held a telephone conference regarding the disputes about these two categories of  
18 documents on December 10, 2013. During that hearing, it ruled that Nixon need not produce the  
19 documents described in paragraph 1, above. The Court also ruled that Nixon must produce the  
20 remaining documents described in paragraph 2, above, but gave it an election as to whether to review  
21 them for work product at its cost or to produce them without review pursuant to Federal Rule of  
22 Evidence 502(d), and with an initial attorneys' eyes only limitation. By letter of December 13, 2013,  
23 Nixon elected the latter.  
24

25 NOW, THEREFORE, IT IS ORDERED AS FOLLOWS:

- 26 1. Nixon is not required to produce the documents described in Paragraph 1, above.  
27  
28

2. Nixon will produce the remaining documents described in paragraph 2, above, within five (5) days of the Court's entry of this Order and will not withhold any documents in that category on the basis of attorney – client privilege or attorney work product protection. This production will be made under Federal Rule of Evidence 502(d) and shall not be construed as a waiver by Nixon of attorney work product protection in this case or in any other case in Federal or state court for the documents produced. The documents so produced shall not be used for any purpose except in connection with the prosecution or defense of the claims asserted in this case or with settlement. Pending further order of the Court, the documents produced may be reviewed only by counsel for plaintiffs and those assisting them in preparing this case and may not be reviewed by plaintiffs or any third parties nor may copies of these documents be transmitted to plaintiffs or any third parties.
3. The parties have agreed that Nixon will also produce documents it has withheld from its previous productions on the basis of attorney work product. This production, too, will be made under Federal Rule of Evidence 502(d) and shall not be construed as a waiver by Nixon of attorney work product protection in this case or in any other case in Federal or state court for the documents produced. The documents so produced shall not be used for any purpose except in connection with the prosecution or defense of the claims asserted in this case or with settlement. Pending further order of the Court, the documents produced may be reviewed only by counsel for plaintiffs and those assisting them in preparing this case and may not be reviewed by plaintiffs or any third parties nor may copies of these documents be transmitted to plaintiffs or any third parties.

Dated: 12/18, 2013



UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
JUDGE

1 APPROVED AS TO FORM:

2 SMITH LILLIS PITHA LLP

3  
4 Date: December 17, 2013

By:                     /s/                      
James Smith  
Attorneys for Plaintiffs

6  
7 NIXON PEABODY LLP

8  
9 Dated: December 17, 2013

By:                     /s/                      
Kent Jonas  
Attorney for Nixon Peabody LLP